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ALEXANDER L. STEVAS,
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No. 84-833

IN THE

Supreme Court Of The United States

October Term, 1984

BEAN DREDGING CORPORATION,
Appellant,

v.

STATE OF ALABAMA,
Appellee.

On Appeal from the Court of Civil Appeals of Alabama
and the Supreme Court of Alabama

Supplement to Motion for Limited Summary Disposition

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April 29, 1985

Supplement to Motion for Limited Summary Disposition

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your appellant, Bean Dredging Corporation, the taxpayer in the above appeal ("the Taxpayer"), respectfully prays that this Court will take into consideration with appellant's motion for summary disposition (included in its petition for rehearing heretofore filed on March 27) the very recent decision of this Court in *Metropolitan Life Insurance Co. v. Ward* (No. 83-1274), rendered on March 26, 1985, for the following reasons:

(1) In *Metropolitan Life* (at page 12 of the Court's opinion), the Court stated:

> "We hold that under the circumstances of this case, promotion of domestic business by discriminating against non-resident competitors is not a legitimate state purpose."

In so holding, the Court noted that a tax structure preferring domestic business over foreign, regardless of how framed, is one that the Court rejected last term in an analogous context arising under the Commerce Clause, citing *Bacchus Imports v. Dias,* 468 U.S. ....., 82 L.Ed.2d 200 (1984).

(2) This appeal involves the same type of discrimination through a framework of taxation under which certain equipment attached to ships, vessels or barges is exempt from taxation only if the ship, vessel or barge is "constructed or built within the state [Alabama]." The State, in arguing to support that type of exemption before the Alabama courts, made just the same type of contention ruled against above, stating:

> "In this case the Legislature intended to favor the Alabama-based builders of ships and barges by granting the exemption only to them. If the restrictive clause 'constructed or built within the state' is removed and the remainder of the section is allowed to stand, the intent of the Legislature would be thwarted. If limiting the exemp-

tion to Alabama builders is unconstitutional, the entire exemption must fail."

Then, under decisions by this Court as well as Alabama's own cases, the entire framework of taxation would fail, at least as applied to this transaction, because otherwise the taxing statute would have a broader coverage than it had when enacted.

(3) While the tests of validity of a classification under the Equal Protection and Commerce Clauses are theoretically different (viz., requiring a rational relationship in the former and prohibiting an undue burden on interstate commerce in the latter), this Court made it clear in *Metropolitan Life* that promotion of domestic business at the expense of out-of-state business through discriminatory taxation is not permissible under either clause. In fact, even if the dissent in *Metropolitan Life* were the opinion of the Court, such discrimination should be even less permissible under the Commerce Clause because a classification like the one here involved obviously places a burden on out-of-state sellers or manufacturers. Please see, in particular, the Court's opinion in *Metropolitan Life* discussing the Commerce Clause at footnotes 6, 9-10 (pp. 7, 11-12 of the Court's opinion).[1]

(4) In seeking consistency in this Court's rulings on the question of interstate commerce, it should not allow the dismissal of an appeal to interfere with the precedential value of

[1] *Metropolitan Life* and this appeal show that discrimination in favor of residents or domestic manufacturers (such as involved in this appeal) is not confined to just one tax but may be found throughout the State's taxing structure. In this connection, for example, Alabama's income tax allows the deduction of moving expenses but only to places within the state, Section 40-18-15 (19), Code of Alabama of 1975; and it permits the nonrecognition of gain from sale of a residence as long as the proceeds are reinvested in a residence in Alabama, but not in a residence elsewhere should the taxpayer be moving to another state (contrary to the treatment under the Federal Internal Revenue Code), Sec. 40-18-14 (2) (h). Such discriminatory exemptions would appear to violate both the Equal Protection and Commerce Clauses, see *WHYY v. Glassboro,* 393 U.S. 117 (1968), *Wheeling Steel Corp. v. Glander,* 337 U.S. 562 (1949), and the decisions of this Court cited in the Taxpayer's petition, especially when those discriminatory provisions constitute an impediment to movements in interstate commerce.

its recent previous decisions in *Bacchus* and the other interstate commerce cases cited in the Taxpayer's petition and motion for limited summary disposition. See particularly, in this connection, *Armco, Inc. v. Hardesty,* 467 U.S. ____, 81 L.Ed.2d 540 (1984), where this Court set aside a West Virginia wholesale gross receipts tax from which local manufacturers were exempt and, in so doing, had to distinguish dismissal of an appeal on the same or a similar issue in a recent previous case (see fn 7, last paragraph of opinion). Thus, in the interest of uniformity of interpretation of the Commerce Clause and so as not to discriminate against jurisdictions whose taxes have already been struck down, this Court should accept this appeal and reverse the lower courts' upholding of this discriminatory tax structure, which we submit it can do by summary disposition as outlined in the Taxpayer's motion.

The undersigned counsel hereby certifies that, because of the recent rendition of the decision in *Metropolitan Life* and the desirability to present the same for consideration in this appeal, this supplement to motion is presented in good faith and not for delay.

WHEREFORE, the Taxpayer respectfully requests this Court's consideration of the foregoing supplemental matter and disposition of this appeal, summarily under Rule 16.7 or otherwise, by reversal and remanding of this case so as to prevent imposition of the discriminatory taxation appealed to this Court.

Respectfully submitted,

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